

PUBLIC CONTRACTS REVIEW BOARD

Case No. 432

WSM/58/2012

Period Contract for the Hire of One Truck Mounted Hydraulic Excavator and One Eight Wheel Tipper Truck including Standbys and Operators for the Separation Site at Ghallis Landfill/Maghtab Rehabilitation Project

This call for tenders was published in the Government Gazette on the 7th February 2012. The closing date for this call with an estimated budget of € 120,000 for 12 months (excl. VAT) was the 28th February 2012.

Five (5) tenderers submitted their offers.

Polidano Bros Ltd filed an objection on the 19th April 2012 against the decision of WasteServ Malta Ltd not to award the tender as the offer was deemed financially non-compliant even though it was the only administratively and technically compliant offer.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday 26th July 2012 to discuss this objection.

Present for the hearing were:

Polidano Bros Ltd


Dr Franco Galea	Legal Representative
Mr Boris Farrugia	Representative
Mr Noel Vella	Representative

WasteServ Malta Ltd

Dr Victor Scerri	Legal Representative
------------------	----------------------

Evaluation Board

Mr Charles Zerafa	Chairman
Mr Marco Borg	Member



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Franco Galea, legal representative of Polidano Bros Ltd, the appellant company, explained that:

- i. the 'Notice of Award of Tender' issued by WasteServ Malta Ltd on 12th April 2012, informed the appellant company that its offer had been discarded because it was financially non-compliant;
 - ii. clause 6.2.1 of the tender document stated that:-

"The Contract shall be operative for a period of twelve (12) months on an 'if and when required' basis, or until the value of €120,000 exclusive of VAT is exhausted, whichever is the earlier. In the event where the €120,000 are not exhausted by the end of the contract period, the Chief Executive Officer reserves the right to extend the validity of the contract for a further period, up to six (6) months, after the termination date of the contract."
 - iii. the appellant company contended that once the contract was on an 'if and when required' basis and the maximum contract value was €120,000 for 12 months, then its offer could never have exceeded the financial resources available because once the allocated financial resources were exhausted the contract would be stopped;
 - iv. the reason for the non-award of the tender given by the contracting authority did not satisfy any of the reasons laid down in clause 5.2.1;
 - v. the appellant company was the present contractor rendering its service to WasteServ Malta Ltd and the rates it quoted in this tender were cheaper than the rates applicable under the current tender;
 - vi. it was noted that a recent call for tenders for similar services issued by WasteServ Malta Ltd, whose closing date was the 7th August 2012, contained a clause similar to 6.2.1 which included also the maximum rate, namely the tender document indicated that the contracting authority had established that the maximum rate for, say, a tipper truck should not exceed €x and so forth (it was clarified that WasteServ Malta Ltd was not in the course of issuing a tender in replacement of the tender procedure in hand but that WasteServ Malta Ltd issued separate tenders for different sites);
- and
- vii. the appellant company had submitted rates which were within the benchmark laid down in the tender document, namely €120,000 over 12 months, and so the tender should not be cancelled.

Dr Victor Scerri, legal representative of WasteServ Malta Ltd, made the following counter submissions:-



- a. the contracting authority based its decision to reject the tenders and to cancel the procedure in accordance with clause 5.2.1 of the tender document, which listed the grounds on which the contracting authority reserved the right to reject and/or to cancel the tender procedure, and specifically to sub-clause (d) which provided that the tender procedure could be cancelled if:-

'All technically compliant tenders exceed the financial resources available.'

- b. clause 6.2.1 only indicated the funds available to procure this service, namely €120,000 for 12 months, but that certainly did not mean that WasteServ Malta Ltd was bound to accept any rate per hour which was within the figure of €120,000;
- c. WasteServ Malta Ltd arrived at the 12-month allocation of €120,000 by making its own internal calculations basing itself on the rate of €65/hr as against the rate of €80.30/hr offered by the appellant company – section 4 of the evaluation report also refers;
- d. when allocating €120,000 for 12 months, WasteServ Malta Ltd was reckoning to procure this service for so many hours during the 12-month period but with the hourly rate offered by the appellant company WasteServ Malta Ltd would be getting the service for a considerably less number of hours or else WasteServ Malta Ltd would have to considerably increase the allocation of €120,000 in order to obtain the same number of hours of service. The contracting authority's legal advisor explained that that was how WasteServ Malta Ltd judged the offer made by the appellant company as exceeding the financial resources available;
- e. it was true that the hourly rate of €65/hr was not published in the tender document but that was the benchmark WasteServ Malta Ltd used for evaluation purposes and to arrive at the 12-month budgetary allocation.

The Chairman Public Contracts Review Board noted that the maximum hourly rate which, apparently, was acceptable to WasteServ Malta Ltd had not been communicated to the bidders in the tender document but what was communicated was the overall 12-month allocation. He added that it would have been more appropriate had the tender document also indicated WasteServ Malta Ltd's maximum rate per hour so that bidders would have known beforehand that they had to compete with offers below the maximum rate indicated by WasteServ Malta Ltd. The Chairman Public Contracts Review Board together with the other Board members observed that, as things stood, the appellant company had abided by the conditions laid down in the tender document.

Mr Charles Zerafa, chairman of the adjudicating board, and Dr Scerri remarked that the rate quoted by the appellant company was not viable and WasteServ Malta Ltd might be constrained to opt not to make use of the service at the rate offered.

The Public Contracts Review Board noted that out of the 5 tenderers who submitted a bid, 2 were administratively non-compliant, 2 technically non-compliant and 1, the appellant company, financially non-compliant.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' filed on the 19th April 2012 and also through their verbal submissions presented during the hearing held on the 26th July 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the 'Notice of Award of Tender' issued by WasteServ Malta Ltd on 12th April 2012, informed the appellant company that its offer had been discarded because it was financially non-compliant, (b) clause 6.2.1 of the tender document stated that *"The Contract shall be operative for a period of twelve (12) months on an 'if and when required' basis, or until the value of €120,000 exclusive of VAT is exhausted, whichever is the earlier. In the event where the €120,000 are not exhausted by the end of the contract period, the Chief Executive Officer reserves the right to extend the validity of the contract for a further period, up to six (6) months, after the termination date of the contract"*, (c) the appellant company contended that once the contract was on an 'if and when required' basis and the maximum contract value was €120,000 for 12 months, then its offer could never have exceeded the financial resources available because once the allocated financial resources were exhausted the contract would be stopped, (d) the reason for the non-award of the tender given by the contracting authority did not satisfy any of the reasons laid down in clause 5.2.1, (e) the appellant company was the present contractor rendering its service to WasteServ Malta Ltd and the rates it quoted in this tender were cheaper than the rates applicable under the current tender, (f) it was noted that a recent call for tenders for similar services issued by WasteServ Malta Ltd, whose closing date was the 7th August 2012, contained a clause similar to 6.2.1 which included also the maximum rate, namely the tender document indicated that the contracting authority had established that the maximum rate for, say, a tipper truck should not exceed €x and so forth, and (g) the appellant company had submitted rates which were within the benchmark laid down in the tender document, namely €120,000 over 12 months, and so the tender should not be cancelled;
- having considered the contracting authority's representatives' reference to the fact that (a) the appellant company based its decision to reject the tenders and to cancel the procedure in accordance with clause 5.2.1 of the tender document, which listed the grounds on which the contracting authority reserved the right to reject and/or to cancel the tender procedure, and specifically to sub-clause (d) which provided that the tender procedure could be cancelled if *"All technically compliant tenders exceed the financial resources available"*, (b) clause 6.2.1 only indicated the funds available to procure this service, namely €120,000 for 12 months, but that certainly did not mean that WasteServ Malta Ltd was bound to accept any rate

per hour which was within the figure of €120,000, (c) WasteServ Malta Ltd arrived at the 12-month allocation of €120,000 by making its own internal calculations basing itself on the rate of €65/hr as against the rate of €80.30/hr offered by the appellant company, (d) when allocating €120,000 for 12 months, WasteServ Malta Ltd was reckoning to procure this service for so many hours during the 12-month period but with the hourly rate offered by the appellant company WasteServ Malta Ltd would be getting the service for a considerably less number of hours or else WasteServ Malta Ltd would have to considerably increase the allocation of €120,000 in order to obtain the same number of hours of service and that it was for this reason that WasteServ Malta Ltd judged the offer made by the appellant company as exceeding the financial resources available, (e) it was true that the hourly rate of €65/hr was not published in the tender document but that was the benchmark WasteServ Malta Ltd used for evaluation purposes and to arrive at the 12-month budgetary allocation and (f) the rate quoted by the appellant company was not viable and WasteServ Malta Ltd might be constrained to opt not to make use of the service at the rate offered,


reached the following conclusions, namely:

1. The Public Contracts Review Board opines that it would have been more appropriate had the tender document also indicated WasteServ Malta Ltd's maximum rate per hour so that bidders would have known beforehand that they had to compete with offers below the maximum rate indicated by WasteServ Malta Ltd. This Board also feels that a recent call for tenders for similar services issued by WasteServ Malta Ltd, whose closing date was the 7th August 2012 and which contained a clause similar to 6.2.1 which included also the maximum rate, proves its line of thought to be correct.
2. This Board observes that, as things stood, the appellant company had abided by the conditions laid down in the tender document and, as a consequence, the stand taken by the contracting authority at this stage went beyond its operational parameters and this in view of the fact that a participating tenderer cannot be penalised for observing '*ad litteram*' a tender document's specifications. Needless to say that, albeit public procurement regulations provide the contracting authority with some degree of operational leverage and rights when it comes to the adjudication of tenders, yet, these should not be interpreted as if they are effective in total oblivion of the rights of the tendering entities.


In view of the above, this Board finds in favour of the appellant company and recommends that the said appellant be reinstated in the tender evaluation process as well as recommending that the deposit paid by the appellant company for the appeal to be lodged be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

31st July 2012